79-1488

Supreme Court, U. S.
FILED
MAR 24 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States of America

OCTOBER TERM, 1979

Case No:_____

RAUL HERNANDEZ, JESUS HERNANDEZ,
JUAN RAYMOND HERRERA and
PEDRO RICARDO GUTIERREZ,
Petitioners,
VS
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, Raul Hernandez, Jesus Hernandez, Juan Raymond Herrera and Pedro Ricardo Gutierrez, respectfully pray that a Writ of Certiorari issue to review the Final Judgment of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on December 7, 1979, affirming the Petitioners' conviction in the United States District Court for the Middle District of Florida.

DECISION BELOW

The Opinion of the Circuit Court of Appeals for the Fifth Circuit is reported at 607 Fd.2d 1145 (1979). A copy of the Court's Opinion appears in the Appendix Hereto (Pg. A-1-14).

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit

was entered on December 7, 1979. A timely Petition for Rehearing and Rehearing En Banc was filed. The Court of Appeals entered its Order denying the Petition for Rehearing and Petition for Rehearing En Banc on February 4, 1980. An extension of time for filing this Petition was applied for and granted by Order of Justice Lewis F. Powell, Jr. on February 12, 1980, extending the time for filing this Petition until March 25, 1980. This Petition for a Writ of Certiorari is therefore timely filed.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C., Section 1254(1) and Supreme Court Rule 19(1)(b).

QUESTION PRESENTED

The question presented by this case is as follows:

WHETHER THE FOURTH AMENDMENT PERMITS UNITED STATES CUSTOMS AGENTS TO STOP, ENTER AND BOARD A MOVING VESSEL WHICH THEY ENCOUNTER IN THE INLAND WATERS WHEN A PREPONDERANCE OF THE EVIDENCE DOES NOT EXIST TO SUPPORT A BORDER CROSSING AND WHEN THE EVIDENCE IS LESS THAN PROBABLE CAUSE.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution which provides in pertinent part:

"THE RIGHT OF THE PEOPLE TO BE SECURE IN THEIR PERSON, HOUSES, PAPERS, AND EFFECTS AGAINST UNREASONABLE SEARCHES AND SEIZURES, SHALL NOT BE VIOLATED, AND NO WARRANTS SHALL ISSUE, BUT UPON PROBABLE CAUSE, SUPPORTED BY OATH OR AFFIRMATION, AND PARTICULARLY DESCRIBING THE PLACE TO BE SEARCHED, AND THE PERSONS OR THINGS TO BE SEIZED."

STATEMENT OF THE CASE

On June 14, 1978, the Federal Grand Jury in Tampa, Florida returned a two (2) count indictment against the Petitioners (Tr. Vol. I, 1). Count One charged the Petitioners with Possession with Intent to Distribute Marijuana in violation of 21 U.S.C., Section 841(a)(1). Count Two charged the Petitioners with Conspiracy to Possess with Intent to Distribute Marijuana in violation of 21 U.S.C., Section 846. Prior to the commencement of the trial, the Petitioners filed Motions to Suppress Evidence (Tr. Vol. I, 15, 26, 35, 40, Vol. II, 71). The Motions to Suppress were denied by the Trial Judge. The Petitioners were subsequently convicted at a Jury Trial and the Trial Court thereafter sentenced them to terms of imprisonment followed by special parole terms.

All of the events surrounding the search and seizure of the shrimping vessel, Bonnie Lass, on June 9, 1978, took place within the domestic or territorial waters of the United States. More specifically, the events took place within the inland waters of Upper Tampa Bay.

During a routine patrol of Tampa Bay, around midnight on June 8, 1978, Customs Officers spotted a shrimping vessel approximately 65' in length, traveling up the shipping channel towards Tampa. The Bonnie Lass was well-lit, with deck lights illuminating the aft or rear working deck area and two range lights indicating the position of the vessel relative to a vessel approaching it (Tr. Vol. III, 36-38). The red and green navigational lights located on the bow or the white light on the stern were not lit. The Customs boat pursuing the vessel, commonly known as a Cigarette and generally capable of attaining speeds upward to 50-55 miles per hour, pulled off to the side of the channel and followed the vessel at a distance of a half-mile to a mile. Officers utilized night vision devices to assist surveillance.

Other than the lack of a red and green navigational light, the Customs agents observed nothing unusual about the way

the Bonnie Lass was proceeding through the water (Tr. Vol. III, 41). Moreover, the 65' shrimper appeared to be fully rigged for shrimping and the Customs agents did not observe any cargo on deck, illegal or otherwise, nor any unusual activity of the crew (Tr. Vol. III, 40-41). Furthermore, there was no evidence that the shrimper was riding low in the water, taking any evasive action, or making an effort to conceal itself as it steamed up the ship channel. The Customs agents were aware that Tampa is a busy, seasonal shrimping center (Tr. Vol. III, 133), being one of many places from Key West to Tarpon Springs along the Florida Coast, that are common territory for shrimp boats (Tr. Vol. III, 134). In fact, one agent testified that on prior Customs patrols, he had seen many shrimp boats like the Bonnie Lass passing through the ship channel at night (Tr. Vol. III, 43). Approximately two hours after first being observed, the Bonnie Lass departed the main ship channel and proceeded to a point about one mile southwest of Apollo Beach, a residential area with a public launching facility and marine facilities providing ice, gas and other marine products and parts (Tr. Vol. III, 61-62).

The range and deck lights of the Bonnie Lass were extinguished and the vessel went dead in the water.

At approximately 1:25 A.M., the Customs officers observed a small vessel in the vicinity of the Bonnie Lass and the officers testified that the Bonnie Lass and the smaller vessel closed with one another. However, the officers had great difficulty in viewing what was going on, being unable to give any further description of the size, make or speed of the smaller vessel, or even the number of its crew (Tr. Vol. III, 52-54). More importantly, the officers could only recall one such closing of the two vessels (Tr. Vol. III, 57), and when pressed, admitted that it was very difficult to judge distances while on the water at night (Tr. Vol. III, 115-116), admitting that they could not even state positively that the Bonnie Lass and the smaller vessel actually came into contact (Tr. Vol. III, 119-120).

Claiming to have viewed a brief exchange of flashing lights between the two vessels (Tr. Vol. III, 19), all of the officers agreed that they observed no off-loading of cargo or crew while the small vessel and the Bonnie Lass were in the same area. Further, no officer witnessed any specific illegal activity on the part of the Bonnie Lass (Tr. Vol. III, 54-55).

With regards to the significance attached to the smaller vessel by the Customs agents, although they had notified the Miami Communications Sector about the activities of the Bonnie Lass, and although they called in air support as well as other marine and ground patrol units (Tr. Vol. III, 84-85), they never requested any sort of surveillance or followup investigation on the small vessel by land vehicles or otherwise (Tr. Vol. III, 149). Furthermore, absolutely no further investigation was undertaken to determine the identity or activities of the smaller vessel (Tr. Vol. III, 149).

Approximately 45 minutes later, the shrimper returned to the shipping channel without lights. In the channel, all required lights, including navigational lights, were turned on. As the vessel headed down the bay in the opposite direction from whence it came, significantly, the Bonnie Lass was in full conformity with navigational law when boarded and entered by Customs. Further, the Bonnie Lass continued to look to the officers like a routine shrimper, with proper riggings, nets in place, and nothing improper observed on the deck. She was moving at approximately the same speed as when first observed and was taking no evasive action or course (Tr. Vol. III, 60).

The Customs agents, in constant communication with a Customs aircraft, a Customs support boat and the land vehicles (Tr. Vol. III, 86), testified that their Customs pursuit vessel was able to easily control their surveillance of the Bonnie Lass (Tr. Vol. III, 16). At approximately 4:50 A.M., while a mile to a mile and a half southwest of the Skyway and still well within the inland waters of Tampa Bay, the decision was finally made to board the Bonnie Lass by the three officers in the Customs pursuit vessel (Tr. Vol. III, 94, 142).

The Customs officers testified to observing one or two boats in the area as the Bonnie Lass was outbound. However, they admitted that they had no specific information to connect any of these vessels to the Bonnie Lass (Tr. Vol. III, 122-125). Also, the Customs agents observed no exchange of signals between the one or two smaller vessels and the Bonnie Lass (Tr. Vol. III, 192). Shortly before stopping, boarding and entering the vessel, she was identified as the Bonnie Lass with a homeport of Tampa, Florida. This information was inscribed on the stern of the vessel (Tr. Vol. III, 160). The name and the homeport of the vessel permitted the Customs agents to determine prior to boarding that the Bonnie Lass was not on the list containing vessels suspected of being involved in smuggling marijuana (Tr. Vol. III, 92).

The officers aboard the Customs pursuit vessel made their presence known to the Bonnie Lass by pulling alongside, displaying a lighted Customs sign and announcing their identity in a loud voice.

The Bonnie Lass came immediately to a complete stop and the boarding occurred without resistance (Tr. Vol. III, 22). Two Customs agents, both armed, boarded the vessel. Significantly, there was a shotgun or a riot gun displayed in a ready position at the time of the boarding (Tr. Vol. III, 74-75). The Customs officer on board was handed the ship's documents and questioned one of five men aboard as to whether he was the captain or the owner or the master named in the documents, and whether the vessel was carrying any cargo, shrimp or fish. During the conversation which occurred aboard the Bonnie Lass, the officer smelled marijuana. A full search which followed revealed 1312 bales of the marijuana on board.

The two Customs agents involved in the surveillance gave different reasons for the stop. Officer McCullough testified that the primary reason for the stop, boarding and search was to make a navigational check for documents (Tr. Vol. III, 61-62). Officer Scott, on the other hand, testified it was his intention to

go aboard the boat to further his previous suspicions (Tr. Vol. III, 195).

The officers had no information that the specific shrimping vessel, Bonnie Lass, had recently entered the domestic waters of the United States from international waters or any foreign ports (Tr. Vol. III, 95). More specifically, the only known fact to the Customs officers concerning whether the Bonnie Lass had entered Tampa Bay from international waters was the direction she was headed when first seen by the officers at a location well within the domestic territorial waters of Tampa Bay.

REASONS FOR GRANTING THE WRIT

The Decision of the Fifth Circuit Court of Appeals, in effect, creates in United States Customs Agents a special class of law enforcement agents in this country because the decision permits Customs Agents to conduct full searches and seizures on evidence less than probable cause in factual and geographical settings outside their traditional role of policing and patroling the borders, thus, the Decision is in conflict with the Constitution.

The qualification for review on Certiorari, as specified in *Rule* 19 of this Court, is abundantly and compellingly fulfilled by the case at bar in that the Fifth Circuit Court of Appeals has rendered a decision in conflict with decisions of this Honorable Court, to-wit: *Terry* vs *Ohio*, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968), *Almeida-Sanchez* vs *United States*, 413 U.S. 266, 37 L.Ed.2d 596, 93 S.Ct. 2535 (1973), *United States* vs *Brignoni-Ponce*, 422 U.S. 873, 45 L.Ed.2d 607, 95 S.Ct. 2574 (1975), *Delaware* vs *Prouse*, _____U.S._____, 59 L.Ed.2d 660, 99 S.Ct. 1391 (1979), *Dunaway* vs *New York*, _____U.S. _____, 60 L.Ed.2d 829, 99 S.Ct._____(1979). Additionally, the Fifth Circuit Court of Appeals through its decision has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned a departure by a Lower Court from the essential requirements of the law as to call for an exercise of this Honorable Court's power of supervision.

Finally, the Decision of the Fifth Circuit Court of Appeals is constitutionally improper for two reasons: (1) the Decision clearly sanctions a form of governmental intrusion that is not permitted by the Fourth Amendment to the United States Constitution; (2) the Decision applies 19 U.S.C., Section 1581(a) in a manner that is in violation of the Fourth Amendment to the United States Constitution.

All of the facts and circumstances known to the Customs Agents involved here occurred within the inland waters of Tampa Bay on the West Coast of Florida. Furthermore, without question, the facts and circumstances presented were not sufficient to establish a border crossing by any acceptable standard of proof.

In that regard, the Petitioners urge that the case at bar presents an excellent opportunity for this Honorable Court to define the principles of law governing the authority of United States Customs Officers under 19 U.S.C.A. Section 1581(a) to stop and board a motor vessel located entirely in inland waters and outside the sphere of Customs waters under circumstances where the preponderance of the evidence does not support a border crossing by such a motor vessel.

The Petitioners urge that Customs Agents under the factual circumstances here must govern their activities and intrusions by the rules set out for law enforcement officers in the cases cited above.

The principal thrust of Petitioners' appeal to the Fifth Circuit Court of Appeals was that the Trial Court erred in denying their Motions to Suppress Evidence. The Fifth Circuit rejected this contention and, in upholding t' e propriety of the seizure of the evidence, promulgated the following principle of law:

> We therefore conclude that Customs officers may make an investigatory stop of a vessel on inland waters adjacent to the Gulf of Mexico under 19 U.S.C.A., Section 1581(a) on facts which justify a reasonable suspicion of illegal activity. The evidence need not support suspicion of a border crossing, but only the presence of contraband. Page 1148.

As the Fifth Circuit further stated it was concerned "only with the officers' justification for stopping and *boarding* the vessel." (Emphasis supplied). Page 1148.

Therefore, the Petitioners here will concentrate their argument on the justification and authority of Customs Agents to commit the initial intrusion caused by stopping, boarding, and by analogy entering a commercial vessel in the inland waters of a large bay. It is this initial government intrusion which is pro-

tected by the Fourth Amendment and it is this initial government intrusion which must be closely scrutinized to determine the proper constitutional authority of Customs Agents in this geographical circumstance.

The legal predicate which the Fifth Circuit utilized for the justification of the officers' activity in stopping, entering and boarding this motor vessel was this Honorable Court's opinion in *United States* vs *Brignoni-Ponce*, 422 U.S. 873, 45 L.Ed.2d 607, 95 S.Ct. 2574 (1975).

Since *Brignoni-Ponce* involved the stopping of a motor vehicle, it is obvious that the Fifth Circuit, for Fourth Amendment purposes, has equated the (1) governmental intrusion resulting from the stopping *and boarding* of a motor vessel and the expectation of privacy of individuals in a motor vessel with the (2) governmental intrusion resulting from the mere stopping of a motor vehicle and the expectation of privacy of individuals in a motor vehicle. The Petitioners contend herein that such an equation is legally and logically unsound, so that the Fifth Circuit's reliance on the reasonable suspicion test of *Brignoni-Ponce* is inappropriate when applied to the governmental intrusion which occurs in the boarding of a motor vessel on inland waters. Therefore, a conflict exists.

Prior to the landmark case of *Terry* vs *Ohio*, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968), the standard of probable cause vis-a-vis the application of the Fourth Amendment was an absolute one. *Terry* relaxed this standard in a very limited manner in that *Terry* for the first time gave narrow authority to a police officer to conduct a limited, on-the-scene frisk for weapons when the officer had reason to believe he was confronted with an armed and dangerous person even though the officer had no probable cause to arrest the person. The justification for the relaxation of this standard of probable cause was two fold. First, it involved a seizure substantially less intrusive than a traditional arrest. Second, taking into account the competing interest of public safety and individual rights, such a

minimal intrusion upon private liberty was a valid method of protecting the public and preventing crimes.

Subsequent to the rendition of *Terry*, this Honorable Court has applied narrow dictates of *Terry* in a variety of other factual situations, one of which was *United States* vs *Brignoni-Ponce, supra*, the case upon which the Fifth Circuit based its opinion herein. But *Terry* and its progeny have always been consistent in holding that although a law enforcement officer may stop a person or a vehicle on reasonable suspicion alone, the stopping and subsequent investigation must be brief in duration, limited in nature, narrowly circumscribed as to its purpose, and substantially less intrusive than a traditional search or seizure which requires probable cause.

Additionally, these cases have always engaged in a balancing test to determine the propriety of the application of the reasonable suspicion test to a given factual situation. That is, do the legitimate needs of law enforcement require such a degree of intrusion on private interests on less than probable cause? Thus, as recently as *Dunaway* vs *New York*, _____U.S._____, 60 L.Ed.2d 829, 99 S.Ct._____ (1979), this Court declined to give law enforcement officers the authority to detain and question an individual on reasonable suspicion alone since the detention in that case had all the trappings of a traditional arrest.

In the instant case, the Petitioners would urge that the reasonable suspicion test formulated by *Terry* and its progeny, more specifically, *Brignoni-Ponce*, is not an appropriate standard to justify the actions of the Customs officers in stopping and boarding this motor vessel in this geographical circumstance. The Fifth Circuit's decision upholding their action conflicts with *Brignoni-Ponce* and grants to Customs a power to conduct searches that is not constitutionally granted to any other governmental agency, including the Border Patrol.

First, there is a vast difference in the occurring governmental intrusion between the actual stopping of a person on a

street or the stopping of a motor vehicle on a highway, and a stopping, boarding, entering and detention of a motor vessel which is underway. The former can be accomplished with relative ease and little disruption either to the individual, those around him or to the officer engaging in the stop. The latter requires intricate maneuvers such as alerting the crew that the vessel must stop, making sure that other vessels around it are alert to the fact that it is stopping, coordinating its stopping with the boarding vessel to insure a safe rendezvous, and careful consideration of other factors such as weather conditions, wave heights, depths of water, and nearness to shore. The fears, anxieties, embarrassments, angers, humiliations and general discomforts resulting from the stopping and boarding of a motor vessel certainly are not inconsequential. Furthermore, in the case of commercial vessels, as here, there are the additional considerations of interruption of business activities and enterprise and the dangers, dreads, and inconveniences associated with such interruptions.

Second and most importantly, in order to accomplish the ultimate purpose of making an investigatory stop of a motor vessel, a boarding officer must of necessity enter and board the motor vessel. In effect, this involves, as took place in Petitioners' case, an entry and intrusion onto private property and a breaking of the close in the traditional common law sense. That is, when a Customs officer sets foot aboard a vessel, he is actually committing a substantial intrusion of the type so jealously guarded by the Fourth Amendment. Certainly, by analogy, this Honorable Court, as evidenced by its prior opinions, would not sanction an entry into a motor vehicle on less than probable cause. That is exactly the sort of trespass by governmental agents that the Fifth Circuit Opinion here has sanctioned with regard to motor vessels in inland waters.

Third, the law, especially in the Fifth Circuit, has already recognized a higher degree of expectation of privacy inherent in a motor vessel than in a motor vehicle. Indeed, the Fifth Circuit recognized this doctrine in *United States* vs *Cadena*, 488 F.2d 100 (5th Cir. 1979) when it stated that:

> The ship is the sailor's home. There is hardly the expectation of privacy even in the curtained limousine or the stereo-equipped van that every mariner or yachtsman expects aboard his vessel. Page 101.

While the Petitioners recognize that in *Cadena* the Court slightly qualified that assertion because of the inherent mobility of a vessel on the seas and thus ended up equating a motor vessel with a motor vehicle for Fourth Amendment purposes, it is obvious that the Court was concerned with vessels plying *the high seas*. This is not the case here. Remember, the Petitioners' vessel, at all times, was observed and located entirely within the confines of the inland waters of Tampa Bay, its home port.

Therefore, by no stretch of the imagination can it be logically or legally argued that the stopping, boarding and entry of a motor vessel is brief in duration or limited in nature. Rather, it has all the trappings of a traditional, full-fledged seizure, such as was condemned in *Dunaway*, and which requires probable cause and not reasonable suspicion.

In balancing the government's interest in law enforcement and the individual's expectation of privacy rights, the basic question here is whether there exists a less intrusive law enforcement alternative?

The Petitioners do not suggest that the Customs officers in the case here were required to turn their heads to what they believed were suspicious activities. Such would not be a reasonable law enforcement procedure. The Petitioners do suggest that under the circumstances presented here, and which certainly will be presented again and again in the inland waters of this country, a more reasonable balancing of the interests would be to permit a *stopping* of the vessel for inquiry without an automatic entry or boarding. This is exactly the approach sanctioned in *Brignoni-Ponce* and it can be practically applied to vessels found in inland waters. Of course a case by case analysis is required, but all interests are protected if Customs is required to stop and inquire before going further when they find a suspicious vessel under circumstances that do not permit the blanket

use of 19 U.S.C., Section 1581. If such an inquiry leads to more suspicious information, then when this information rises to the level of probable cause, a boarding is warranted. This is the obligation of Border Patrol officers under *Brignoni-Ponce* and it would work for Customs on inland waters.

Certainly, modern technology permits easy communication between Customs vessels and private vessels within sight of each other. Certainly, if weather conditions do not permit a stop and inquiry, these same conditions would not permit a stop and entry or boarding. Certainly, if the vessel refused to stop and respond to inquiry, the totality of facts could give rise to probable cause and further Customs action. Certainly, the procedure of stopping and inquiring presents no more hazards to the safety of the Customs agents than a stopping and boarding. Certainly, if vessels could escape from a stop and inquiry, they could escape from a stop and entry or boarding. This is especially true in inland waters. In sum, the procedure of stopping and inquiring insures proper police investigation while protecting the expectation of privacy of those aboard vessels.

In conclusion, the Petitioners would urge that the Fifth Circuit Opinion sanctions a substantial degree of intrusion on less than probable cause, i.e., stopping, entry and boarding of a motor vessel on inland waters, which is beyond the permissible bounds and parameters of the minimal intrusions heretofore sanctioned by this Honorable Court.

Based on the foregoing, the Petitioners would urge this Honorable Court to grant Certiorari for the purpose of determining whether the Opinion in the United States Court of Appeals for the Fifth Circuit based on the actual record of this case, conflicts with the pronouncements of this Court in *Terry* vs *Ohio*, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968), *Almeida-Sanchez* vs *United States*, 413 U.S. 266, 37 L.Ed.2d 596, 93 S.Ct. 2535 (1973), *United States* vs *Brignoni-Ponce*, 422 U.S. 873, 45 L.Ed.2d 607, 95 S.Ct. 2574 (1975), *Delaware* vs *Prouse*, _____U.S._____, 59 L.Ed.2d 660, 99 S.Ct. 1391 (1979) and *Dunaway* vs *New York*, _____U.S._____, 60 L.Ed.2d 829, 99 S.Ct._____(1979).

CONCLUSION

The decision below departs radically from both substantive and procedural judicial precedent in that it cannot be reconciled with the decisions of this Court in *Terry* vs *Ohio*, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968), *Almeida-Sanchez* vs *United States*, 413 U.S. 266, 37 L.Ed.2d 596, 93 S.Ct. 2535 (1973), *United States* vs *Brignoni-Ponce*, 422 U.S. 873, 45 L.Ed.2d 607, 95 S.Ct. 2574 (1975), *Delaware* vs *Prouse*, _____U.S._____, 59 L.Ed.2d 660, 99 S.Ct. 1391 (1979) and *Dunaway* vs *New York*, _____U.S._____, 60 L.Ed.2d 829, 99 S.Ct. _____ (1979). In that the matter involved is of extreme general and national significance and in that the maintenance of uniformity and the administration of criminal justice in the Federal Courts is jeopardized by the decision below, it is therefore, for all of the reasons listed above, most strenuously urged that this Honorable Court exercise its discretion and grant the Writ.

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ADOPTION OF PETITION OF CO-PETITIONER

The Petitioners hereby adopt by reference that Petition for Writ of Certiorari filed or to be filed with this Honorable Court by their Co-Petitioner relating to the same point of law involved herein, except when said Petition is in conflict with their own.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that all parties required to be served herein have been served and further certify that a copy of the foregoing Petition has been served upon United States Solicitor General, Department of Justice, Washington, D.C., 20530, and upon the United States Attorney of the Middle District of Florida, 500 Zack Street, 4th Floor, Tampa, Florida, 33602, by United States Mail, Postage Prepaid, on this the 20th day of March, 1980.

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APPENDIX

UNITED STATES of America,

Plaintiff-Appellee,

v.

Venerando German SERRANO, Pedro Ricardo Gutierrez, Jesus Hernandez, Juan Raymond Herrera and Raul Hernandez,

Defendants-Appellants.

No. 78-5600.

United States Court of Appeals, Fifth Circuit.

Dec. 7, 1979.

Defendants who had been apprehended in Tampa Bay on a shrimping boat carrying 50,000 pounds of marijuana were convicted in the United States District Court for the Middle District of Florida, at Tampa, Wm. Terrell Hodges, J., of conspiracy to possess with intent to distribute and possession with intent to distribute marijuana, and they appealed. The Court of Appeals, Roney, Circuit Judge, held that: (1) customs officers may make an investigatory stop of a vessel on inland waters adjacent to the Gulf of Mexico on facts which justify a reasonable suspicion of illegal activity; (2) such facts existed in the instant case; (3) motions to disqualify trial judge were properly denied where alleged bias was judicial rather than personal and where facts in affidavit would not have convinced a reasonable person of the existence of personal bias against defendants; and (4) prosecutor's comments in final rebuttal argument on defendants' failure to give customs officers the same explanation as was advanced in their closing argument was a permissible response to such closing argument and not an improper comment on defendants' silence.

Affirmed.

1. Searches and Seizures 7(1)

Searches and seizures made pursuant to statute authorizing customs officers to board vessels, examine documents, and search the vessel must meet the general standard of reasonableness imposed by the Fourth Amendment. Tariff Act of 1930, § 581(a), 19 U.S.C.A. § 1581(a); U.S.C.A. Const. Amend. 4.

2. Customs Duties 126

Customs officers may make an investigatory stop of a vessel on inland waters adjacent to the open Gulf of Mexico on facts which justify a reasonable suspicion of illegal activity, and the evidence need not support a suspicion of a boarder crossing, but only of the presence of contraband. Tariff Act of 1930, § 581(a), 19 U.S.C.A. § 1581(a).

3. Customs Duties 126

There existed reasonable suspicion that shrimp boat was engaged in illegal smuggling activities, justifying stopping and boarding of the vessel by customs officers on inland waters adjacent to the Gulf of Mexico, where officers had observed boat travel at midnight up main shipping channel without navigation lights, proceed to shallow area near residential area not normally frequented by shipping vessels, rendezvous with another darkened vessel after exchange of lights, and then proceed toward the Gulf of Mexico. Tariff Act of 1930, § 581(a), 19 U.S.C.A. § 1581(a); U.S.C.A.Const. Amend. 4.

4. Judges 51(4)

Once a party files a timely and sufficient affidavit that trial judge is personally prejudiced against him, statute demands the trial judge's recusal; however, while the trial judge may not pass on the truthfulness of the affidavit's allegations, he must determine whether the facts set out in the affidavit are legally sufficient to require recusal. 28 U.S.C.A. § 144.

5. Judges 51(3)

For facts set our in affidavit to be legally sufficient to require recusal of judge, facts must be material and stated with particularity, must be such that if true they would convince a

reasonable person that bias exists, and must show that bias is personal as opposed to judicial in nature. 28 U.S.C.A. § 144.

6. Judges 49(2)

Motions to disqualify judge in marijuana-smuggling prosecution on ground that judge had stated in a similar case an intent to deal as sternly as the law would permit with persons convicted of importing contraband, though he would review each case on a case-by-case basis were properly denied since alleged bias was judicial rather than personal, stemming from judge's observations in a strictly judicial capacity as to the volume of such cases and the lack of deterrent effect of light sentences, and since the facts in the affidavit would not have convinced a reasonable person of the existence of personal bias against defendants. 28 U.S.C.A. § 144.

7. Judges 49(1)

To be disqualifying, alleged bias or prejudice of judge must stem from an extrajudicial source. 28 U.S.C.A. § 144.

8. Criminal Law 706 (3)

Question asked of customs officer by prosecutor as to whether defendant, after being taken into custody aboard vessel loaded with marijuana, had ever told him of his whereabouts before boarding the vessel was not so suggestive as to constitute comment on defendant's silence where objection was sustained and the question, which could have been answered "yes" or "no," was never answered.

9. Criminal Law 720(1)

Where defendants' failure to explain their dilemma to customs agents upon boarding and initial questioning was totally inconsistent with tale of desperate flight and desire to rid themselves of cargo of marijuana which they allegedly discovered after being hired as crew aboard the vessel, and where, at time of boarding and general questioning, defendants were not subjected to coercive or custodial interrogation but only to those restrictions imposed by a routine customs check, Government's final rebuttal argument referring to the defense theory and questioning defendants' failure to relate the same explana-

tion to customs officers was permissible and not an improper comment on defendants' silence. U.S.C.A.Const. Amend. 5.

Douglas J. Titus, Jr., Asst. U.S. Atty., Tampa, Fla., for plaintiff-appellee.

Joseph Ficarrotta, Tampa, Fla., for J. Hernandez.

Anthony F. Gonzalez, Tampa, Fla., for Herrera and Hernandez.

Richard A. Lazzara, Tampa, Fla., for Herrera.

Bennie Lazzara, Jr., Tampa, Fla., for Gutierrez and R. Hernandez.

William R. Tunkey, Weiner, Robbins & Tunkey, P.A., Jeffrey S. Weiner, Miami, Fla., for Serrano.

Appeals from the United States District Court for the Middle District of Florida.

Before WISDOM, AINSWORTH and RONEY, Circuit Judges.

RONEY, Circuit Judge:

Five defendants apprehended in Tampa Bay, Florida, on a boat carrying 50,000 pounds of marijuana appeal convictions for conspiracy to possess with intent to distribute and possession with intent to distribute marijuana. 21 U.S.C.A. §§ 841(a)(1), 846. They challenge three aspects of their trial: denial of their motion to suppress evidence obtained on an alleged illegal search of the boat; denial of their motion for disqualification of the trial judge because of certain statements he had made previously about narcotics cases; and references by the Government in the course of its case-in-chief and rebuttal closing argument to defendants' silence at the time of arrest. We affirm.

During a routine patrol of Tampa Bay around midnight on June 8, 1978, Customs officers spotted a shrimping vessel approximately sixty-five feet in length traveling up the shipping channel towards Tampa without required red and green navigational lights on the bow or white light on the stern. The Customs boat pulled off to the side of the channel and then followed the vessel at a distance of a half-mile to a mile. Officers utilized night vision devices to assist surveillance. The shrimping vessel left the channel and proceeded into shallow waters as it neared Apollo Beach, a residential area with a public launching facility and marina. Its range and deck lights were extinguished, and it went dead in the water. Lights were flashed between the shrimper and a smaller vessel and the two vessels approached or closed with each other. Approximately forty-five minutes later, the shrimper returned to the shipping channel without lights. In the channel all required lights, including navigational lights, were turned on. As the vessel headed down the bay towards the open waters of the Gulf of Mexico, several small boats were sighted in her immediate vicinity. Customs officers identified the vessel as the BONNIE LASS, identified themselves and boarded the vessel. A Customs officer was handed the ship's documents and questioned one of five men aboard as to whether he was the captain or the owner or master named in the documents and whether the vessel was carrying any cargo, shrimp or fish. During the conversation the officer smelled marijuana. The search which followed revealed 1,312 bales of marijuana on board.

I. *Denial of Motion to Suppress Evidence*

Defendants argue an unconstitutional search of the BONNIE LASS. The case was presented to the district court, and argued before this Court on appeal, as if probable cause was required in order for the boarding of the vessel to be legal. The district court found probable cause to be a close question, but held that probable cause existed for the boarding.

Based on recent decisions by this Court, we conclude that only reasonable suspicion of illegal activity was necessary to justify the boarding. The evidence clearly meets this standard, even though the evidence might also support the denial of the motion to suppress based on the probable cause standard.

[1] Customs officers are authorized by 19 U.S.C.A. § 1581(a) to

> go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area estab-

> lished under sections 1701 and 1703-1711 of this title, or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

Searches and seizures made pursuant to the statute must, of course, meet the general standard of reasonableness imposed by the Fourth Amendment. *United States v. Freeman*, 579 F.2d 942, 945 (5th Cir. 1978).

This Court has considered several Fourth Amendment attacks on Customs boardings or searches conducted in inland or internal waters, the ports, harbors, bays, river mouths and adjacent parts of the sea inside the coastline. The cases have indicated that these bodies of water adjacent to the sea are not part of "customs waters" but have not decided whether random Customs boarding and document checks would be constitutionally permissible in these waters. See *United States v. Whitmire*, 595 F.2d 1303, 1315-1316 (5th Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3262 (Sept. 5, 1979, No. 79-375); *United States v. Castro*, 596 F.2d 674, 676 (5th Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3177 (Aug. 13, 1979, No. 79-229).

Customs boardings have been approved in inland waters where Customs officials had reasonable suspicion of a Customs violation. In *United States v. Whitmire*, *supra*, the Court assessed the constitutionality of a boarding of a boat initially sighted traveling in the intracoastal waterway but boarded only after it had reached the dock and its occupants had gone ashore. The Court held the boarding constitutional where the officers had reasonable suspicion of a Customs violation, and the boarding followed an unsatisfactory document check on shore. 595 F.2d at 1316. The Court noted that but for the fact that the boat had reached shore and defendants had disembarked, the boarding would have been justified as an "investigatory stop" under *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); *United States v. Whitmire*, 595 F.2d at 1308.

A search of a vessel moored in a marina four miles from the Gulf of Mexico was declared unconstitutional in *United States*

v. Williams, 544 F.2d 807 (5th Cir. 1977). The Court concluded that at the time of boarding the "probably unseaworthy private craft," Customs officers had

> no knowledge of articulable facts which, taken together with logical inferences from those facts, would cause them reasonably to believe that this vessel fell into customs' area of concern, or that a violation of the law was being committed on board.

544 F.2d at 811.

The Supreme Court, considering entry of illegal aliens by automobile, concluded in *Brignoni-Ponce* that Border Patrol Officers conducting roving patrols in the border area could stop vehicles where they are aware of "specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion" that the stopped vehicle contains illegal aliens. 422 U.S. at 884, 95 S.Ct. at 2582.

Most recently, this Court considered an inland waters Customs boarding under conditions very similar to those before us. The boarding in *United States v. Castro*, *supra*, occurred after Customs observed the boat in the intracoastal waterway heading towards open waters 20 miles away. The boarding, which occurred before the boat reached the coastline, was held constitutional based on "sufficient articulable facts to support an inference" that the vessel was involved in smuggling contraband.

[2] We therefore conclude that Customs officers may make an investigatory stop of a vessel on inland waters adjacent to the open Gulf of Mexico under 19 U.S.C.A. § 1581(a) on facts which justify a reasonable suspicion of illegal activity. The evidence need not support suspicion of a border crossing, but only of the presence of contraband. *See United States v. Rivera*, 595 F.2d 1095, 1098 n.4 (5th Cir. 1979).

We are concerned here only with the officers' justification for stopping and boarding the vessel. Defendants do not contest the existence of probable cause to search the vessel once officers had boarded and smelled marijuana. *See United States v. Freeman*, 579 F.2d 942, 948 (5th Cir. 1978).

Brignoni-Ponce includes as factors to be considered in

assessing reasonable suspicion, proximity to the border, usual traffic patterns in the area, recent illegal traffic, the driver's behavior and aspects of the vehicle's appearance. 422 U.S. at 884-885, 95 S.Ct. 2574.

[3] The BONNIE LASS was in inland waters adjacent to the open seas throughout her Customs surveillance and at the time of boarding. The Customs officers who boarded the BONNIE LASS had observed the boat traveling at midnight up the main shipping channel without navigation lights. They saw the boat turn out of the channel, extinguish all lights and proceed into a shallow area near a residential area not normally frequented by shrimping vessels. The BONNIE LASS was observed to rendezvous with another darkened vessel after an exchange of lights. One of the officers testified that in five years of patrolling Tampa Bay he had seen only one other vessel of this kind leave the channel and behave in a similar manner. During the course of this night's patrol the officers saw no vessels at all other than the ones involved in these incidents. When the vessel was stopped, though apparently still five or six miles from the "border" three miles offshore, it was nearing the mouth of the bay and was apparently going out into the Gulf of Mexico. These observations and the rational inferences they engender reasonably warranted the Customs officers' suspicion that the BONNIE LASS was engaged in illegal smuggling activities. The stop and boarding therefore withstand defendants' constitutional challenge.

II. *Trial Judge's Refusal to Recuse Himself*

Defendants contend the trial judge committed prejudicial and reversible error in denying their motions to disqualify the trial judge, predicated on 28 U.S.C.A. §§ 144, 455. The affidavits accompanying defendants' motions claimed Judge Hodges had a personal bias and prejudice against defendants as members of a class of persons charged with large-scale marijuana offenses. In support of this claim, defendants recited remarks made by Judge Hodges in sentencing proceedings in a similar case several months before. Judge Hodges had stated:

> Frankly, I wonder whether the term of imprisonment now provided in these plea agreements is sufficient to serve any useful purpose as a general deterrent, given the experience that this Court has had not only recently, but contemporaneously, with the ongoing importation of contraband from Colombia into this Country, and especially this District.
>
> And I declared from this Bench as recently as yesterday in a case being tried, and in just these words, that I am sick and tired of it.
>
> I'm going to accept the plea agreement in this case, but I give warning now to the United States Attorney's office and to the public, and without in any way abdicating my judicial discretion and reviewing each case on a case-by-case basis, that I intend to deal as sternly as the law will permit in the future with anybody who is convicted in this court before me of the offense of importing contraband from anyplace outside the United States into the United States, and I intend to apply that approach in an evenheaded fashion regardless of the nationality of the defendants.

Referring to the large number of Colombian citizens indicted for similar offenses, Judge Hodges continued:

> Perhaps the attitude I have expressed is an inflexible one. But the only tool that the law has given me to combat this obvious flow of...contraband from the Republic of Colombia to the United States is to put those who bring it here in prison. And I frankly declare that's what I intend to do, if I have to put the entire population of that Country in an American penitentiary.

[4, 5] Once a party files a timely and sufficient affidavit that the trial judge is personally prejudiced against him, 28 U.S.C.A. § 144 demands the trial judge's recusal. While the trial judge may not pass upon the truthfulness of the affidavit's allegations, he must determine whether the facts set out in the affidavit are legally sufficient to require recusal. *Davis v. Board of School Commissioners*, 517 F.2d 1044, 1051 (5th Cir. 1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976). The formula for legal sufficiency adopted by this Court requires defendant to show:

1. The facts are material and stated with particularity.
2. The facts are such that, if true they would convince a reasonable person that a bias exists.

3. The facts show the bias is personal, as opposed to judicial, in nature.

Parrish v. Board of Commissioners of Alabama State Bar, 524 F.2d 98, 100 (5th Cir. 1975) (*en banc*), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976).

[6] We conclude that Judge Hodges properly denied the motions to disqualify because the alleged bias was judicial rather than personal and because the facts in the affidavit would not have convinced a reasonable person of the existence of personal bias against the defendants.

[7] To be disqualifying, the alleged bias of prejudice must stem from an extrajudicial source. *United States v. Grinnell Corp.*, 384 U.S. 563, 583, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966); *Davis v. Board of School Commissioners*, 517 F.2d at 1051 (origin of alleged bias was language in order then before the court and an opinion in a previous case). *See, e. g., Berger v. United States*, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481 (1921) (prejudice against German-Americans). Reading Judge Hodges' remarks in context clearly demonstrates that any predisposition to sentence volume drug offenders severely stemmed from his observations in a strictly judicial capacity as to the volume of such cases in the courts and the lack of deterrent effect of light sentences for such offenders. *See also United States v. Johnson*, 537 F.2d 1170, 1175 (4th Cir. 1976) (district judge's announced belief heroin distribution deserved severe punishment did not disqualify him from conducting retrial); *Baskin v. Brown*, 174 F.2d 391, 394 (4th Cir. 1949) (in racial discrimination suit affidavits showed, at most, judge's zeal for upholding blacks' rights and indignation at attempts to deny them, and statute never contemplated disqualification for bias against wrongdoers acquired from evidence presented in the course of judicial proceedings before him); *Smith v. Danyo*, 441 F.Supp. 171, 180 (M.D.Pa.1977), *aff'd*, 585 F.2d 83 (3d Cir. 1978) (attitude judge may entertain toward subject matter of a case, here sentiment that personal injury suits do not belong in federal courts, does not disqualify him); *Denis v. Perfect Parts*, 142 F.Supp. 263 (D.Mass.1956) (statute not directed to judicial exposure to similar questions so judge who had previously determined validity of plaintiff's patent could hear infringement suit against new defendant). *Cf. United States v. Thompson*, 483 F.2d 527, 530 (3d Cir. 1973), *cert. denied*, 415 U.S. 911, 94 S.Ct. 1456, 39 L.Ed.2d 496 (1974) (Adams, J., *dissenting*) (bias against class

"personal" when based on characteristic extraneous to judicial process, *e. g.*, race, and "judicial" when based on trait defined by legal or judicial consideration such as violation of particular law).

Neither would the facts asserted in the affidavit convince a reasonable person of the bias which disqualifies a judicial officer. While Judge Hodges' remarks indicated his dissatisfaction with the nondeterrent effect of plea-bargained light sentences and his intention to impose stiffer penalties to curb large scale drug importation, his remarks were prefaced by an explicit commitment to the continued use of judicial discretion and review of each case on a case-by-case basis. This aspect of Judge Hodges' statement distinguishes this case from the Third Circuit cases cited in support of defendants' position, *United States v. Thompson*, 483 F.2d 527 (3d Cir. 1973) and *United States v. Townsend*, 478 F.2d 1072 (3d Cir. 1973), in which the trial judge announced a practice of sentencing all selective service violators to at least two and a half years in prison no matter what "good people" they were. Nothing in Judge Hodges' statement reasonably suggests that in sentencing defendants he would fail to consider presentence reports or any defendant's statement on his own behalf or that he would not tailor sentences to the individual circumstances of each defendant. While our review is properly limited to assessment of the affidavit's sufficiency, we note that Judge Hodges used presentence reports and heard testimony in mitigation from all defendants, and a less than mandatory sentence as given each defendant.

III. *Prosecutorial Comment on Defendants' Silence*

[8] Defendants' final contention is that the Government committed reversible error by improperly commenting during trial on defendants' silence. Defendants challenge two instances of improper comment, neither of which compels reversal of their convictions.

In examining one of the Customs officers, the Government asked whether defendant Gutierrez, after being taken into custody, had ever told him of his whereabouts before boarding the BONNIE LASS. Defendant's objection was sustained, the question was never answered and defendant Gutierrez' post-arrest silence never elicited. The question could have been answered "yes" and "no," and, standing alone, it is not so suggestive as to

constitute comment on defendant's silence. *Pineda v. State of Florida*, 564 F.2d 1163 (5th Cir. 1977), *cert. denied*, 436 U.S. 909, 98 S.Ct. 2245, 56 L.Ed.2d 409 (1978).

[9] The Government in its final rebuttal argument, referring to a defense theory advanced during defendants' final arguments, questioned in the following manner defendants' failure to relate the same explanation to the Customs officers who stopped and boarded the BONNIE LASS:

> Why didn't they call the police? Why did they lie? Why did Raul Hernandez say, "No cargo—no cargo" when the Customs people got on the boat?—When it's everywhere?
>
> Why didn't he say "Thank God you're here. We've got all this pot. We hijacked this boat. I don't know who it belongs to. We just happened to be out in the dead of night in Apollo Beach, a residential area, flashing lights—these people brought us on a boat and they were flashing lights at us. And we didn't—you know, gee, we didn't know that the boat—I mean, obviously, we thought it was legal, because all the lights were out in the shrimper and they wanted us to see them so they turned all the lights out."

Defendants contend that prosecutorial use of their silence to impeach the exculpatory story offered at trial violated due process rights recognized in *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). Defendants cite as additional support three decisions in which this Court interpreted and applied *Doyle* to find reversible error in prosecutorial comment on defendants' silence. *United States v. Meneses-Davila*, 580 F.2d 888 (5th Cir. 1978); *Chapman v. United States*, 547 F.2d 1240 (5th Cir.), *cert. denied*, 431 U.S. 908, 97 S.Ct. 1705, 52 L.Ed.2d 393 (1977); *United States v. Luna*, 539 F.2d 417 (5th Cir. 1976).

None of the case support adduced by defendants controls the question before us. In each of those cases, the prosecutor commented on a defendant's failure to exculpate himself after he had been arrested and given *Miranda* warnings. The *Doyle* opinion emphasizes the significance of *Miranda* warnings to the constitutional dimension of improper prosecutorial comment:

> The warnings mandated by that case,...require that a person taken into custody be advised immediately that he has the right to remain silent,...Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested.

426 U.S. at 617, 96 S.Ct. at 2244. We are not dealing with ambiguous silence arguably inspired by *Miranda* warnings.

At the time of the boarding and general questioning, defendants were not subjected to coercive or custodial interrogation but only to those restrictions imposed by a routine Customs check. *See United States v. Warren*, 578 F.2d 1058, 1070 (5th Cir. 1978) (*en banc*); *United States v. Thompson*, 475 F.2d 1359, 1364 (5th Cir. 1973). *See generally Annot.*, 31 A.L.R.3d 565, 657-662 (1970).

The explanation for defendants' presence on a boat filled with 50,000 pounds of marijuana was raised for the first time in defendants' closing arguments. In essence, defendants claimed to have boarded the boat at Apollo Beach as hired crew, ignorant of their intended mission. The captain of the vessel, a mysterious figure whose part in these events was never intimated in the course of the trial, went ashore to make arrangements for disposal of the illicit cargo. Meanwhile defendants discovered the marijuana and fled, hijacking the boat with the intention of dumping its cargo in the Gulf of Mexico.

The BONNIE LASS was pursued, the story goes, by several small boats commanded, perhaps, by the enraged captain, defendants suggest. The small boats circled and pulled in front of the BONNIE LASS, trying to intercept her. When the Customs boat arrived on the scene, the smaller boats disappeared. In closing arguments, defendants stressed the maneuvers of these small boats, repeatedly asking why the Customs officers made no attempt to apprehend them since they carried the real culprits.

Defendants suggested their full cooperation with Customs when boarded, pointing out that no resistance had been offered, defendants had helped by adjusting the brooms and one defendant had even made coffee "for everyone's comfort."

The Government responded to this dramatic characterization of the defendants' predicament in rebuttal closing argument by pointing out its inconsistencies with the manner in which defendants actually received the Customs officers when they boarded. Rather than expressing relief at what would have been their rescue, defendants kept silent and denied having any cargo at all. The Government relates the omitted explanation which should have been given Customs with obvious sarcasm which suggests that the reason the story was not offered was its patent absurdity.

While we find defendants' case authority inapposite, this Court has considered the impeachment use of pre-arrest, pre-*Miranda* silence in *United States v. Henderson*, 565 F.2d 900 (5th Cir. 1978). The Court stated:

> The silence of an accused who has not been given a *Miranda* warning cannot be used against him to impeach his credibility, unless his silence is inconsistent with his innocence and inconsistent with his exculpatory statement given at the trial. Otherwise, it lacks significant probative value and carries with it an intolerable prejudicial impact.

565 F.2d at 905.

Defendants' failure to explain their dilemma to Customs agents upon boarding and initial questioning is totally inconsistent with their tale of desperate flight and desire to rid themselves of the cargo. The situation is analogous to the scenario depicted in *United States v. Harp*, 536 F.2d 601 (5th Cir. 1976). In *Harp* the Court considered comment on the failure of prisoners apprehended in the middle of an apparent escape attempt to tell the warden the story offered at trial that one prisoner had kidnapped the other nine and forced them into the escape vehicle. The Court found reversible error since *Miranda* warnings had been issued before the failure to explain, but noted that absent *Doyle's* emphasis on *Miranda* warnings, the failure to promptly advise officials of their duress would have been highly probative of the recent fabrication of their exculpatory story.

We conclude that the prosecutor's comments were a permissible response to defendants' closing arguments.

AFFIRMED.

United States Court of Appeals
Fifth Circuit

February 4, 1980

TO ALL PARTIES LISTED BELOW:

No. 78-5600

United States of America

-vs-

Venerando German Serrano, et al

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition(s) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By H. E. Adams, Jr.
Deputy Clerk

cc: Mr. Joseph Ficarrotta
Mr. Anthony F. Gonzalez
Mr. Richard A. Lazzara
Mr. Bennie Lazzara, Jr.
Mr. William R. Tunkey
Mr. Jeffrey S. Weiner
Mr. Gary Betz
Mr. Douglas J. Titus, Jr.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 78-55
CR-T-H

UNITED STATES OF AMERICA

v.

PEDRO RICARDO GUTIERREZ; JUAN RAYMOND HERRERA; VENERANDO GERMAN SERRANO; JESUS HERNANDEZ; and RAUL HERNANDEZ

The Grand Jury charges that:

COUNT ONE

On or about the 9th day of June, 1978, in the Middle District of Florida,

PEDRO RICARDO GUTIERREZ,
JUAN RAYMOND HERRERA,
VENERANDO GERMAN SERRANO,
JESUS HERNANDEZ, and
RAUL HERNANDEZ

did knowingly, intentionally and unlawfully possess with intent to distribute approximately 50,946 pounds of marijuana, a schedule I controlled substance; in violation of Title 21, United States Code, Section 841(a)(1) and Title 18 United States Code, Section 2.

COUNT TWO

From a date unknown to the Grand Jury up to and including on or about the 9th day of June, 1978, in the Middle District of Florida,

PEDRO RICARDO GUTIERREZ,
JUAN RAYMOND HERRERA,
VENERANDO GERMAN SERRANO,
JESUS HERNANDEZ, and
RAUL HERNANDEZ,

the defendants herein, and other co-conspirators unknown to the Grand Jury, did unlawfully, knowingly and intentionally combine, conspire, confederate and agree, together and with each other, to unlawfully and intentionally possess with the intent to distribute approximately 50,946 pounds of marijuana, a schedule I controlled substance; in violation of Title 21, United States Code, Section 841(a)(1).

OVERT ACT

In furtherance of the above conspiracy and to effect the objects thereof, the Grand Jury charges that at least one of the above-named defendants and co-conspirators performed the following overt acts:

1. On or about the 9th day of June, 1978, at approximately 2:00 A.M. the Bonnie Lass *met with a smaller vessel in the area of Apollo Beach, Florida.*

2. On or about the 9th day of June, 1978, PEDRO RICARDO GUTIERREZ, JUAN RAYMOND HERRERA, VENERANDO GERMAN SERRANO, JESUS HERNANDEZ, and RAUL HERNANDEZ directed the Bonnie Lass into the main shipping channel of Tampa Bay at approximately 3:00 A.M. at which time the running lights of the Bonnie Lass were turned on;

All in violation of Title 21, United States Code, Section 846.

A TRUE BILL

Louise A. Kippsie
Foreman

JOHN L. BRIGGS
United States Attorney

By: DOUGLAS J. TITUS, JR.
Assistant United States Attorney